

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

10 BANDSPEED, INC.,)
11 Plaintiff,)
12 VS.) AU:11-CV-00771-LY
13 ACER, INC., ACER AMERICA CORPORATION, BELKIN)
INTERNATIONAL, INC., BELKIN, INC., CASIO COMPUTER CO.,)
14 LTD., CASIO HITACHI MOBILE COMMUNICATIONS CO., LTD.,)
CASIO AMERICA, INC., GARMIN INTERNATIONAL, INC.,)
15 GARMIN USA, INC., GN NETCOM A/S, GN U.S., INC.,)
HEWLETT-PACKARD COMPANY, HEWLETT-PACKARD DEVELOPMENT)
16 COMPANY, L.P., HTC CORPORATION, HTC AMERICA, INC.,)
HUAWEI TECHNOLOGIES COMPANY, LTD., KYOCERA)
17 CORPORATION, KYOCERA INTERNATIONAL, INC., KYOCERA)
COMMUNICATIONS, INC., KYOCERA WIRELESS CORPORATION,)
18 LENOVO (UNITED STATES) INC., LG ELECTRONICS, INC.,)
LG ELECTRONICS U.S.A., INC., LG ELECTRONICS MOBILECOMM)
19 U.S.A., INC., MOTOROLA SOLUTIONS, INC., NOKIA)
CORPORATION, NOKIA INC., PANTECH WIRELESS, INC.,)
20 PLANTRONICS, INC., RESEARCH IN MOTION LIMITED, RESEARCH)
IN MOTION CORPORATION, SAMSUNG TELECOMMUNICATIONS)
21 AMERICA, LLC, TOMTOM INTERNATIONAL B.V., TOMTOM, INC.,)
TOSHIBA CORPORATION, TOSHIBA AMERICA INFORMATION)
22 SYSTEMS, INC., TOSHIBA AMERICA, INC., BLUETOOTH SIG,)
INC., MOTOROLA MOBILITY, INC., PANTECH WIRELESS, INC.,)
23 BELKIN, INC., BELKIN INTERNATIONAL, INC., LENOVO)
(UNITED STATES) INC., MOTOROLA SOLUTIONS, INC., TOSHIBA)
24 CORPORATION, TOSHIBA AMERICA, INC., TOSHIBA AMERICA)
INFORMATION SYSTEMS, INC., TOMTOM, INC., PLANTRONICS,)
25 INC., SAMSUNG TELECOMMUNICATIONS AMERICA, LLC,)

1 HEWLETT-PACKARD COMPANY, HEWLETT-PACKARD DEVELOPMENT)
2 COMPANY, L.P., GARMIN USA, INC., GARMIN INTERNATIONAL,)
3 INC., KYOCERA COMMUNICATIONS, INC., KYOCERA)
4 INTERNATIONAL, INC., GN U.S., INC., GN NETCOM A/S, LG)
5 ELECTRONICS, INC., LG ELECTRONICS MOBILECOMM U.S.A.,)
6 INC., LG ELECTRONICS U.S.A., INC., RESEARCH IN MOTION)
7 LIMITED, RESEARCH IN MOTION CORPORATION, HUAWEI)
8 TECHNOLOGIES COMPANY, LTD., HTC AMERICA, INC.,)
9 HTC CORPORATION, TOMTOM INTERNATIONAL B.V., MOTOROLA)
MOBILITY, INC., BANDSPEED, INC., TOSHIBA AMERICA)
INFORMATION SYSTEMS, INC,)
Defendants.)

7 *****
8 TRANSCRIPT OF NON-EVIDENTIARY HEARING
BEFORE THE HONORABLE LEE YEAKEL
9 *****

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10:00:16 1 (Open Court)

10:00:16 2 THE COURT: We're here this morning on both of the

10:00:21 3 Bandspeed cases, the 593 and the 771 cases. I called this

10:00:28 4 conference because I had concern that some or many of you might

10:00:33 5 be running a little short on your hourly billing requirements

10:00:36 6 in your firm here at the end of the year. So this might be a

10:00:40 7 good opportunity to give you a little bit more.

10:00:44 8 I have reviewed the status report in the 771 case and

10:00:50 9 the amended report in the 593 case. And so really what I

10:00:54 10 anticipate trying to do today is give you-all the direction

10:01:03 11 that I'm going to take in this case.

10:01:05 12 Let me start and find out who is here. And I'll

10:01:10 13 start with the plaintiffs. If you'll make announcement,

10:01:13 14 please.

10:01:13 15 MR. GOODPASTOR: Good morning, Your Honor.

10:01:15 16 Chris Goodpastor for Plaintiff Bandspeed, joined by Kurt Sauer.

10:01:23 17 MS. FROST: Good morning, Your Honor. Claudia Frost

10:01:25 18 for CSR.

10:01:27 19 MR. WEAVER: Good morning, Your Honor. David Weaver

10:01:29 20 on behalf Research in Motion.

10:01:31 21 MR. MITCHELL: Mark Mitchell and Bonnie Grant on

10:01:34 22 behalf of the Motorola entities.

10:01:36 23 MS. ALQUIST: Good morning, Your Honor. Beth Alquist

10:01:38 24 for Lego.

10:01:41 25 MR. WILLIAMS: Good morning, Your Honor. Roger

10:01:42 1 Williams on behalf of the Toshiba defendants.

10:01:46 2 MR. TERRAZAS: Good morning Your Honor,

10:01:47 3 Kevin Terrazas on behalf of Belkin.

10:01:50 4 MR. FINDLAY: Good morning, Your Honor. Eric Findlay

10:01:52 5 on behalf of HTC.

10:01:53 6 MR. CRAFT: Good morning. Brian Craft. I'm here on

10:01:55 7 behalf of the Acer entities.

10:01:57 8 MR. HORTON: Your Honor, Russ Horton along with

10:01:59 9 Andrew Bramhall on been behalf of the Sony entities.

10:02:02 10 MR. BRAMHALL: Good morning, Your Honor.

10:02:03 11 MR. STEPHENS: Good morning, Your Honor.

10:02:03 12 Garland Stephens, here for LG today.

10:02:07 13 MR. O'BRIEN: Good morning, Your Honor. Dan O'Brien

10:02:08 14 on behalf of Huawei.

10:02:09 15 MS. NAVA: Good morning, Your Honor. Brenna Nava on

10:02:11 16 behalf of Parrot in the 593 and GN Netcom in the 791.

10:02:17 17 MR. NESTER: Good morning, Your Honor. Brian Nester

10:02:19 18 on behalf of RIM.

10:02:21 19 MS. GRANT: I'm Bonnie Grant. My co-counsel Mark

10:02:24 20 introduced me. I'm here for the Motorola defendants.

10:02:26 21 MR. WINGARD: Good morning, Your Honor.

10:02:27 22 Steve Wingard on behalf of Garmin.

10:02:32 23 MR. HEPTIG: Good morning, Your Honor. Pat Heptig

10:02:33 24 for Plantronics.

10:02:33 25 MR. SIEBMAN: Good morning, Your Honor. Clyde

10:02:36 1 Siebman on behalf of Bluetooth.

10:02:37 2 MR. YORK: Good morning, Your Honor. Larry York for
10:02:38 3 TomTom.

10:02:41 4 MR. ALLEN: And good morning, Your Honor.

10:02:42 5 Stacy Allen for Lego.

10:02:43 6 THE COURT: All right. Well, thank you-all. And if
10:02:45 7 any of you speak during the course of this conference, please
10:02:49 8 again announce your name and who you represent when you get up
10:02:52 9 to speak in order that the court reporter will be able to get
10:02:56 10 that. She's really quick, but I'll bet she didn't hold all of
10:03:00 11 your names firmly in her head for this.

10:03:03 12 This conference got a little bit easier with the
10:03:13 13 settlement with Dell, because as many of you understood, I had
10:03:17 14 a conflict with Dell that I was wrestling with how best to
10:03:22 15 resolve it. And some of you may like what the solution was
10:03:27 16 going to be or not the solution, but you were getting ready to
10:03:31 17 get your Christmas present as a transfer to Judge Sparks's
10:03:35 18 Court because I satisfied myself that it was an unwaivable
10:03:39 19 conflict. Odd, but that's the way it was.

10:03:44 20 So those of you who wanted to go downstairs can be
10:03:47 21 sad during the holidays, and those of you who didn't can be
10:03:51 22 happy because, of all of the assembled other parties in this
10:03:55 23 case, that was the only one I had a problem with.

10:03:57 24 I will tell you that I am leaning strongly toward the
10:04:02 25 supplier-first option that was set forth in the status reports

10:04:07 1 that I received and reviewed. It seems to me that there is no
10:04:11 2 perfect solution to resolve a case of this size. I am not as
10:04:22 3 concerned as some of you were in your status reports about how
10:04:26 4 long it may take to try if I were to just proceed ahead to try
10:04:31 5 the case all at once.

10:04:33 6 Even though we have large dockets here, the way you
10:04:39 7 handle -- or at least the way I believe that I handle large and
10:04:44 8 complex cases is you just get started with them and you try
10:04:48 9 them and you finish them. But I do think in this case a lot
10:04:52 10 would be accomplished by determining the situation with regard
10:04:57 11 to suppliers initially.

10:05:05 12 Now in our last conference, and as noted in the
10:05:07 13 reports that you have filed, Dell had definitely indicated that
10:05:13 14 it wanted to add another supplier to the case -- Broadcom. Let
10:05:23 15 me ask the rest of you: Is there anyone else who desires to
10:05:29 16 add any other parties to this case or anyone who does not
10:05:39 17 believe that all of the appropriate parties that need to be in
10:05:42 18 this case are in this case if we were to proceed with the
10:05:50 19 supplier-first option?

10:05:54 20 Mr. Weaver?

10:05:56 21 MR. WEAVER: Your Honor, David Weaver on behalf of
10:05:59 22 Research in Motion. As the case is currently postured,
10:06:03 23 Your Honor, there is only one product for RIM that has been
10:06:07 24 accused. It is the Pearl 8100. That product has only a CSR
10:06:14 25 chip in it. So from RIM's perspective, as the case is

10:06:17 1 currently postured we would not need or desire to add in
10:06:26 2 another chip manufacturer.

10:06:27 3 However, as the Court is fully aware from the status
10:06:30 4 reports, both of them, Bandspeed intends to add in or has
10:06:34 5 indicated that they do intend to add in numerous additional
10:06:39 6 products. If that occurs, then RIM, and I think many of the
10:06:43 7 other defendants in this room, would have additional chips that
10:06:47 8 would be implicated. As it currently stands, Your Honor, I
10:06:51 9 have no idea because, Bandspeed has not formally told us what
10:06:56 10 additional RIM products they intend to add.

10:06:58 11 But at the very least, we anticipate that if this
10:07:03 12 Court is inclined to allow them to add new products, that they
10:07:06 13 would accuse products that would implicate TI-based chips. If
10:07:14 14 that is the case, then RIM would intend to bring in that
10:07:17 15 additional chip supplier, TI, or would at least finally be in a
10:07:21 16 position where it could tender the defense of the case to that
10:07:25 17 chip supplier. As it's currently postured, obviously,
10:07:29 18 Your Honor, we can't tender a defense where a claim has not
10:07:32 19 been asserted against one of those accused products.

10:07:37 20 I think there are other defendants in the room that
10:07:39 21 would be in the same posture. Currently there's only a CSR
10:07:41 22 chip that may be implicated. But if more products were
10:07:44 23 accused, because they only have a single product accused, other
10:07:48 24 chips would be indicated.

10:07:49 25 THE COURT: Thank you. Is there anyone that wants to

10:07:52 1 speak in addition or disagrees with the statements Mr. Weaver
10:07:55 2 just made?

10:07:59 3 MR. STEPHENS: Your Honor, Garland Stephens for LG.
10:08:02 4 I don't disagree with anything Mr. Weaver said. I
10:08:04 5 will point out that at least for LG, the products that are
10:08:07 6 currently accused involve Broadcom chips. And we were
10:08:11 7 expecting Broadcom to be impleaded by Dell. Since that has not
10:08:15 8 happened, I have taken it up with my client whether they want
10:08:18 9 to attempt to implead Broadcom themselves.

10:08:22 10 THE COURT: You have taken it up with your client?

10:08:26 11 MR. STEPHENS: I have. We haven't resolved yet how
10:08:28 12 to accomplish that, but I have asked them about it. It's under
10:08:32 13 consideration.

10:08:32 14 THE COURT: All right. Thank you. Anyone else from
10:08:34 15 the defendant? Mr. Mitchell?

10:08:35 16 MR. MITCHELL: On behalf of the Motorola entities,
10:08:39 17 Your Honor, we agree with Mr. Weaver's statement and are
10:08:41 18 similarly situated and would be in a position, if additional
10:08:46 19 accused products were added to the case to tender the defense
10:08:48 20 to those chip manufacturers.

10:08:53 21 MR. BRAMHALL: Your Honor, Andrew Bramhall for the
10:08:57 22 Sony defendants. We are in the first case, the 593 case, and
10:09:01 23 we also have only CSR, or product with CSR chips at issue
10:09:07 24 currently. So we also agree with Mr. Weaver's statements.

10:09:10 25 THE COURT: All right. If you agree, you don't have

10:09:12 1 to come tell me you agree. You're welcome to. I'm more
10:09:16 2 interested right now knowing what you don't agree on than what
10:09:19 3 you are going to agree on.

10:09:21 4 MR. WEAVER: Your Honor, people so seldom agree with
10:09:23 5 me, I'm appreciating the reinforcement of that position.

10:09:26 6 THE COURT: Well, it is a holiday season.

10:09:29 7 MR. WEAVER: I understand.

10:09:29 8 THE COURT: You're entitled to that.

10:09:31 9 MR. TERRAZAS: Your Honor, Kevin Terrazas for the
10:09:33 10 Belkin defendant. Your Honor, we agree with Mr. Stephens and
10:09:35 11 LG. We have Broadcom chips. We are still ongoing in
10:09:38 12 discussion with our client whether or not to try to implead
10:09:41 13 Broadcom as well. But that's still an open issue for us.

10:09:47 14 THE COURT: All right.

10:09:49 15 Now, Mr. Goodpastor, Mr. Sauer, the 593 case has been
10:10:02 16 around for a relatively long period of time. It's an '09 case
10:10:12 17 that with filed in '09. I would have thought that I would have
10:10:18 18 had more discussion from you-all with regard to what other
10:10:22 19 products you might want to implead. I realize that we have
10:10:28 20 been dealing with Markman and other matters, and then we had
10:10:32 21 the transfer of this case down.

10:10:35 22 I would like to get at least the first stage of this
10:10:40 23 case moving and done as quickly as possible. So let me hear
10:10:46 24 from you-all on why it is important to identify further
10:10:54 25 infringing products at this time, what it would accomplish, and

10:11:00 1 what would be the difference between having additional
10:11:03 2 infringing products and additional chip manufacturers other
10:11:09 3 than Broadcom in here instead of just proceeding ahead and
10:11:18 4 allowing anyone who wants to bring Broadcom in to bring
10:11:21 5 Broadcom in and proceeding with the product we have and seeing
10:11:24 6 how that sorts itself out.

10:11:28 7 MR. GOODPASTOR: Your Honor, if I may address that
10:11:30 8 Chris Goodpastor for Bandspeed.

10:11:33 9 We think it's important to bring in additional
10:11:36 10 products to avoid an argument by defendants that by not
10:11:41 11 bringing additional products in this suit regarding these
10:11:43 12 patents we somehow waived the right to do that in the future.
10:11:47 13 And, therefore, to avoid that argument -- we're not saying we
10:11:49 14 necessarily agree with that. But to avoid that argument, we
10:11:52 15 think it's important to do it.

10:11:53 16 Typically what happens in a case like this, you'll
10:11:58 17 take some discovery on reasonably similar products and you get
10:12:03 18 that discovery back. And after you have that discovery, then
10:12:05 19 you have a deadline to add the other reasonably similar
10:12:08 20 products that are related to the patent that are infringing.

10:12:11 21 We haven't had that opportunity for discovery in this
10:12:13 22 case. We've had a little opportunity for discovery in the 771
10:12:17 23 case. But most of the defendants have taken the position that
10:12:20 24 they're not going to answer that discovery given the current
10:12:24 25 state of pleadings.

10:12:25 1 So what we've decided to do is add products based
10:12:30 2 upon information that we've be able to, after extensive
10:12:35 3 analysis, glean from the third party and possibly from
10:12:39 4 Defendants and use that information to add some additional
10:12:41 5 products, knowing that we're going to have to take additional
10:12:44 6 discovery and that product list based on that discovery may
10:12:47 7 change.

10:12:48 8 However, based on the additional analysis -- and it's
10:12:52 9 been fairly extensive -- we believe that we can be in a
10:12:57 10 position to file an amended compliant with additional products
10:13:00 11 by these defendants within a week's time.

10:13:02 12 So it's important to note the reason why we want to
10:13:07 13 do that and how we're going to go about it and that -- and the
10:13:11 14 fact that that product list may change. But it's also
10:13:14 15 important to note two issues with respect to Defendants' plans
10:13:18 16 or at least options to implead certain IC makers in this case.

10:13:22 17 The issues are twofold: One is, if the defendants
10:13:26 18 add the IC makers, it is unclear to us at this point -- and
10:13:33 19 maybe this won't be an issue -- but it's unclear to us at this
10:13:35 20 point whether those IC makers will actually assert a
10:13:38 21 declaratory judgment action against Bandspeed and whether
10:13:42 22 without that declaratory judgment action Bandspeed will be
10:13:46 23 required to assert counterclaims for infringement against those
10:13:50 24 IC makers.

10:13:51 25 Two, if they do in any respect -- even if they don't

10:13:55 1 actually -- in all respect, Bandspeed is going to need
10:13:58 2 additional discovery against and from the IC makers for the
10:14:04 3 same reasons we told you over a year ago we needed additional
10:14:07 4 discovery to assert the claims against CSR when they sought to
10:14:11 5 intervene.

10:14:12 6 We'll need the additional discovery to assert the
10:14:14 7 claims, and we'll definitely need the additional discovery to
10:14:19 8 assert the infringement contentions against the IC makers.
10:14:23 9 Because of the nature of the product and that -- we detailed
10:14:26 10 that in response to the motion to intervene by CSR several
10:14:31 11 months back.

10:14:32 12 So I wanted to make the Court aware of all of those
10:14:35 13 separate issues regarding the potential impleader of the
10:14:39 14 defendants. But to answer your question simply, Your Honor, we
10:14:41 15 can be ready with a new amended complaint with some new
10:14:45 16 products that are subject to confirmation and possibly change
10:14:48 17 after discovery within about a week's time from today.

10:14:51 18 THE COURT: Let me ask you a question: You are
10:14:54 19 familiar, of course, with the proposed dates and schedule that
10:15:01 20 was in the joint status report in the 771 case?

10:15:05 21 MR. GOODPASTOR: Yes, Your Honor. And we came today
10:15:07 22 armed with some revisions to both the proposed schedules
10:15:13 23 depending on whether we had a trial with only current
10:15:15 24 defendants or we actually brought in the IC makers. And I
10:15:18 25 could hand those to the clerk, if you want.

10:15:20 1 THE COURT: Have you had occasion to circulate those
10:15:23 2 to the other parties in this case?

10:15:24 3 MR. GOODPASTOR: We have not, Your Honor. We just
10:15:27 4 finalized them this morning. And I brought extra copies that
10:15:32 5 are circulating now. But, essentially, there are two versions
10:15:36 6 of this. One version has a scheduling order with the current
10:15:40 7 parties only, assuming there aren't going to be any new
10:15:43 8 IC makers impleaded. And the other one is a revised version of
10:15:47 9 the other scheduling order, assuming that additional IC makers
10:15:53 10 will be impleaded as part of the case.

10:15:55 11 And essentially, Your Honor, the difference is the
10:15:57 12 need for further discovery and give the additional IC makers
10:16:01 13 time to enter the case, determine what their response is going
10:16:05 14 to be, and make sure that everybody has time to do those type
10:16:08 15 of things before we start that discovery.

10:16:12 16 But with respect to the scheduling order for the
10:16:14 17 current parties only, Your Honor, it basically just moves most
10:16:17 18 of the dates back a few months.

10:16:19 19 THE COURT: Well, don't spend a whole lot of time on
10:16:22 20 that, because what I believe I've heard from several of these
10:16:26 21 people today is that there -- is that there is at least a
10:16:29 22 strong chance we're not going to proceed with the current
10:16:33 23 parties only. But there is at least talk underway about
10:16:38 24 impleading other parties. What I want to get to is a situation
10:16:43 25 where we know if there are going to be other parties and get

10:16:51 1 them in here and then get this case moving along.

10:16:54 2 I did see Judge Ward the other day, and I thanked him
10:16:58 3 for sending his case down. He apprised me that he bestowed
10:17:04 4 several of those going-away presents on district judges around
10:17:12 5 the state and the country and he was pleased to leave it behind
10:17:15 6 him.

10:17:15 7 So if we're looking at -- let me initially, I guess,
10:17:22 8 address this to, well, all of you. If the -- the first step is
10:17:34 9 for you to file an amended pleading that adds the new products
10:17:41 10 you desire to add, then there probably should be some time for
10:17:48 11 the defendants to review that pleading and determine whether
10:17:55 12 they're going to implead other chip suppliers.

10:17:58 13 MR. GOODPASTOR: We agree, Your Honor. And the --
10:18:01 14 its title -- it's the Excel spreadsheet here.

10:18:04 15 THE COURT: Yeah. I know. I see that.

10:18:08 16 MR. GOODPASTOR: And the schedule we've set up is
10:18:10 17 basically a week after you issue your scheduling order, we'll
10:18:13 18 file our motion for leave to amend. And then 14 days after the
10:18:17 19 order on the motion for leave to amend, if a motion is
10:18:20 20 required -- assume that you require a motion for leave instead
10:18:23 21 of just granting us leave, they would have 14 days to bring in
10:18:27 22 whomever they desire. And we think with the products
10:18:30 23 identified in the amended complaint, that would be plenty of
10:18:34 24 time to identify who is the chip supplier and determine whether
10:18:38 25 they want to bring them in.

10:18:42 1 THE COURT: All right. Y'all have now had a chance
10:18:45 2 to look at this proposal on the plaintiff's part. It's fairly
10:18:55 3 similar to what was in the proposed order. It was just that
10:19:03 4 you're not my only case, and I couldn't get to you by early
10:19:06 5 October when I got this scheduling order back.

10:19:13 6 Mr. Weaver, you rise?

10:19:15 7 MR. WEAVER: Yes, Your Honor. Let me address a
10:19:17 8 couple of things. I have had an opportunity to review their
10:19:20 9 proposal, which is similar to what was in the original joint
10:19:24 10 status report. I guess a couple of comments: One is certainly
10:19:31 11 I welcome the one-week deadline within which to file an amended
10:19:34 12 complaint naming the accused products. I'm a little concerned
10:19:39 13 with the vagueness that Mr. Goodpastor suggested about what new
10:19:46 14 products would be in there and then the potential for
10:19:49 15 additional new products downstream, et cetera.

10:19:53 16 THE COURT: Here's what we need -- Mr. Goodpastor,
10:19:55 17 you need to get this. I do not want to do something as this
10:19:59 18 case sits right now and then get down the line on it and we
10:20:03 19 have a whole bunch of new products after that and the case gets
10:20:06 20 bigger and bigger and bigger without resolution because of
10:20:12 21 products being added and added and added.

10:20:14 22 I want to find out from you-all -- and I expect you
10:20:19 23 as the professionals you are, because you know this case better
10:20:22 24 than I -- what it is going to take to package this case up so I
10:20:29 25 are can render scheduling order and we can get it finished. I

10:20:33 1 will tell you again, I don't care how long it takes to try.
10:20:35 2 I'm not going to be worried about that. If it takes two months
10:20:38 3 to try, I will just have to explain that to all of the other
10:20:45 4 lawyers who are desiring to do things in my Court.

10:20:48 5 It's clearly going to take over a year. We're going
10:20:55 6 to be in the new courthouse in a year, and that gives me a lot
10:20:59 7 of flexibility I haven't had before in that I have other
10:21:00 8 courtrooms. And if I need to bring in a visiting judge to try
10:21:02 9 your case or other cases, I'll be able to do that when we get
10:21:10 10 moved. But what I want and what I'm trying to accomplish with
10:21:12 11 you-all is to get the vagueness out of here.

10:21:15 12 You have done what I asked, and I appreciate that in
10:21:18 13 that I have the status reports. There have been some cases
10:21:20 14 that have been settled out. But I don't want to keep moving
10:21:27 15 this down with unknown factors in it that could change.

10:21:29 16 So Mr. Weaver, you can stay there. Mr. Goodpastor,
10:21:36 17 you can address that. I want to get a point where we have all
10:21:39 18 of the products and all of the parties and we have a schedule.

10:21:49 19 MR. WEAVER: Your Honor, if I might, one thing that
10:21:51 20 could actually short-circuit this: There is a very narrow and
10:21:55 21 limited universe of chip supplies for potentially similar
10:22:00 22 chips. Mr. Goodpastor knows that list quite well in addition
10:22:02 23 to CSR. One of the fastest way to expedite this process would
10:22:07 24 frankly be for them to sue the chip suppliers directly. He can
10:22:12 25 file suit against TI, against Broadcom. In fact, he said in

10:22:16 1 his joint status report that one of his concerns with the
10:22:19 2 CSR-only trial that was proposed in the 593 case was that he'd
10:22:23 3 have to file a second trial against Broadcom directly. So he
10:22:27 4 clearly understands that he's capable of doing that.

10:22:30 5 If we brought in simply TI through the amended
10:22:33 6 complaint, Broadcom, Qualcomm -- and I don't remember. I think
10:22:38 7 there's one other that may be implicated -- that gets all the
10:22:42 8 parties before Your Honor immediately without the need to go
10:22:46 9 through an impleading process, which as Your Honor will no
10:22:50 10 doubt appreciate, some suppliers may grudgingly object to being
10:22:56 11 added into a suit by one of their customers and we may have a
10:23:03 12 whole briefing cycle go on with that.

10:23:05 13 So just for Your Honor to consider.

10:23:08 14 MR. GOODPASTOR: If I may address that, Your Honor?

10:23:10 15 THE COURT: You may, Mr. Goodpastor.

10:23:13 16 MR. GOODPASTOR: I don't believe this is something
10:23:15 17 Mr. Weaver participated in. But the reason we can't bring in
10:23:18 18 the IC makers other than CSR at this point are all those
10:23:21 19 reasons we discussed in response to the CSR motion to
10:23:24 20 intervene. And, therefore, we believe if the additional
10:23:28 21 IC maker is going to be brought in, they're going to have to be
10:23:31 22 brought in by defendants in this case.

10:23:33 23 We can add in, you know, a week's time after the
10:23:36 24 scheduling order a fairly broad set of products based upon our
10:23:41 25 analysis of some information that we've received. It's

10:23:45 1 probably -- I would say it's likely -- I can't guarantee it, I
10:23:48 2 would say it's likely that that broad list of products will
10:23:51 3 address most of the chip manufacturers. I can't guarantee
10:23:55 4 that, though.

10:23:56 5 What we will likely do after that point, after
10:23:59 6 getting some discovery, is if we add new products, it will
10:24:03 7 likely just be new products that are introduced after that
10:24:06 8 point for the most part. We will want to take discovery,
10:24:10 9 though, to confirm our product list. And one way to do that
10:24:14 10 and do it quickly is to, as soon as the discovery stay is
10:24:17 11 lifted, allow us to take discovery on reasonably similar
10:24:21 12 products either through interrogatories or other means and just
10:24:25 13 get that list from defendants. They know what the products
10:24:29 14 are. We get that list from defendants, and then if there is
10:24:32 15 anything additional to add other than new products that are
10:24:35 16 coming out, we'll add them at that time. And that would get us
10:24:38 17 to a point where we could be fairly certain we've got all the
10:24:40 18 products in a pretty short amount of time.

10:24:42 19 Like I said, though, we're going to add a fairly
10:24:44 20 broad array of products in the amended complaint, and I hope
10:24:48 21 that that will address all of the potential impleading issues
10:24:52 22 with respect to the IC makers.

10:24:55 23 THE COURT: Mr. Weaver or anyone else?

10:24:58 24 MR. WEAVER: Your Honor, again, getting that clarity
10:25:02 25 soon is what is critical here. If they are going to be allowed

10:25:06 1 to add new products, getting a date certain for when those are
10:25:10 2 going to be added into the case. I was not in the 593 case,
10:25:15 3 Your Honor, and I'm not aware of all of the details as to why
10:25:18 4 Mr. Goodpastor says he can't accuse the chip manufacturers
10:25:22 5 themselves. The fact of the matter is I think he can. He
10:25:25 6 can -- he's got all of information from RIM on their products.

10:25:28 7 THE COURT: Well, I can't resolve that here today.
10:25:30 8 He says he can't. You say he can. Ms. Frost is here because
10:25:35 9 she intervened. Her manufacturer in here. So there are ways
10:25:40 10 to do it. I'm not going to let another two or three months go
10:25:43 11 by while we figure out who can bring in who. You know, it's --
10:25:47 12 we're at the time that we need to get this thing started one
10:25:53 13 way or the other.

10:26:00 14 Now, if I were to look at the proposal by
10:26:09 15 Mr. Goodpastor, he says he can amend his complaint within a
10:26:15 16 week. So he suggests two weeks after that, for any defendant
10:26:28 17 to file any additional pleadings to bring in any chip supplier.

10:26:34 18 It's not a mystery to anyone that I have been
10:26:40 19 considering the supplier-first option, at least since our last
10:26:44 20 conference on this. So the parties ought to be close enough to
10:26:50 21 where that's three weeks to decide whether you're going to
10:26:56 22 bring in the chip suppliers and to file an amended pleading in
10:27:04 23 that regard. Tell me, Defendants, about that. I'm sure I'm
10:27:16 24 going to hear from somebody that you can't do it.

10:27:18 25 MR. WEAVER: Your Honor, what I'm hearing from folks

10:27:21 1 around the room is that, as we proposed in our original
10:27:24 2 schedule to the Court in the status conference, was 30 days was
10:27:28 3 about what we thought was the fastest time from once we get the
10:27:33 4 list of accused products from Mr. Goodpastor, to go through,
10:27:39 5 identify which chips belong to which chip manufacturers in
10:27:42 6 those products, and then go through, find those contracts, and
10:27:46 7 then tender the defense and prepare the pleadings and try to
10:27:50 8 either bring them voluntarily or through cross-claim.

10:27:53 9 I think 30 days was what we thought was a reasonable
10:27:56 10 period of time from the point at which we get that list from
10:28:01 11 Bandspeed. And I don't know if others have a --

10:28:06 12 THE COURT: Do you still believe that? Just tell me
10:28:08 13 if somebody thinks 30 days is not reasonable.

10:28:13 14 By your silence -- well, one rises. A little slow
10:28:16 15 there.

10:28:19 16 MR. FINDLAY: I apologize. Eric Findlay for HTC.
10:28:22 17 Once we know exactly what is in the case by an amended
10:28:27 18 complaint, I don't think 30 days is necessarily too quick. But
10:28:30 19 I think I can speak for my client and maybe others that I'm a
10:28:34 20 little concerned that we're skipping the step of their having
10:28:38 21 to move and hopefully seek leave from Your Honor to do this.

10:28:41 22 I think there are defendants who, while they would --
10:28:46 23 Plaintiff's may argue the case is early, I think there are
10:28:49 24 defendants who would want the ability, at least for the record,
10:28:52 25 Your Honor, to be able to argue strenuously to you that they

10:28:55 1 should not be allowed to add certain products to the case at
10:28:58 2 this time. And I would like to see that at least baked into
10:29:01 3 the schedule so we have the ability to do that if we deem it
10:29:04 4 appropriate.

10:29:05 5 THE COURT: Well, see, what that argument does to me
10:29:06 6 is make me want to go back and go ahead and try the 593 case
10:29:11 7 and not try to do this what I thought was an easy way now,
10:29:16 8 because now it's not getting to be the easy way. And that's
10:29:19 9 the problem I get into with a big case. I'm looking for the
10:29:22 10 best way to resolve this. And every time I build in other
10:29:27 11 things to allow you-all to plead, you're going to do it,
10:29:31 12 whether it's well-taken or whether you think it's well-taken or
10:29:34 13 not.

10:29:35 14 And I hate to be harsh, but I see a lot of frivolous
10:29:38 15 things in big cases just because lawyers want to put it on the
10:29:42 16 record. I find that it very seldom gets considered by the
10:29:45 17 Federal Circuit, but it takes a long time in this Court. So if
10:29:50 18 I need to go back and not consider the supplier-first option,
10:29:55 19 and put the 771 case on a different schedule and go ahead and
10:29:59 20 schedule the 593 case, then I'm prepared to do that.

10:30:06 21 I don't think that's the best way to do it, but I'm
10:30:09 22 not going to sit here and have us go, "Then we want to file
10:30:12 23 this motion, then we want to file that motion, then we want to
10:30:16 24 file the other motion."

10:30:18 25 I don't care what your clients think. Let me tell

10:30:22 1 you this. I think -- and tell your general counsels that, and
10:30:25 2 you can tell your presidents that.

10:30:27 3 MR. FINDLAY: Yes, Your Honor.

10:30:27 4 THE COURT: The most expeditious way to do this is to
10:30:30 5 forget about who can out-plead one another, tee this thing up
10:30:34 6 the most expeditious way to get the issues before the Court,
10:30:40 7 and to quit worrying about the procedures to get it done and
10:30:44 8 get it tried. That will save your clients a lot of money in
10:30:47 9 the long run.

10:30:49 10 MR. FINDLAY: Your Honor, I understand. I agree
10:30:50 11 completely. But the only point I was trying to make is by the
10:30:53 12 proposal that Counsel had given to us, it appeared he was
10:30:59 13 contemplating the motion for leave to do this. And all I was
10:31:02 14 suggesting, Your Honor, respectfully, is that if that is the
10:31:06 15 course that is taken, that we have the ability to respond to
10:31:08 16 that. And we can do so on an expedited basis, if that's what
10:31:13 17 the Court would want us to do, not anything that would slow
10:31:16 18 down or further stall the case from moving forward, Your Honor.

10:31:19 19 THE COURT: Well, I'm not -- I can decide the
10:31:23 20 question of whether I'm going to grant that leave today. If
10:31:29 21 we're going to have additional infringing product to get this
10:31:33 22 case to conclusion, then I can tell you I'm not going to deny
10:31:37 23 leave to bring them in. We get them in and we get it tried and
10:31:42 24 that's the way it is.

10:31:48 25 You know, I don't care -- they don't have to file

10:31:50 1 leave to amend. That's why we're having this conference. You
10:31:53 2 wouldn't have to file a leave to amend to implead chip
10:31:56 3 suppliers after the fact. Both of these cases have been
10:31:59 4 kicking around a while, one in the Eastern District and one
10:32:02 5 here.

10:32:05 6 So that's what I'm looking at, is to get from you-all
10:32:08 7 as lawyers, as the professionals you are, the most expeditious
10:32:13 8 way to get this case to conclusion. And it's not by arguing
10:32:17 9 over every little nuance that any lawyer can come up with in
10:32:22 10 the pleadings.

10:32:23 11 I am here every day. There is just a limited number
10:32:29 12 of hours in the day. So I would like to do this an easier way
10:32:32 13 that is cheaper for your clients. But if I can't get agreement
10:32:37 14 out of you how to do that, then we will do it how I find it
10:32:42 15 most expeditious and we will work through it.

10:32:44 16 And if it is involved with trying the same case
10:32:47 17 twice, I will try the same case twice. I don't think it's the
10:32:50 18 best way to do it.

10:32:52 19 MR. FINDLAY: I agree with that conclusion,
10:32:53 20 Your Honor. Thank you.

10:32:54 21 THE COURT: Ms. Frost?

10:32:55 22 MS. FROST: Good morning, Your Honor. I'm going to
10:33:02 23 try to see if I can talk about a couple of things that I think
10:33:05 24 will help clarify the situation for the Court and one that
10:33:08 25 hasn't been discussed yet.

10:33:10 1 There are two issues as we see it, and we agree
10:33:16 2 completely with the Court's aspirations to try to get this case
10:33:21 3 resolved as expeditiously as possible. Obviously, CSR
10:33:27 4 intervened two years ago with that in mind, to try to vindicate
10:33:31 5 its clients, its customers' products, and its own. So it is
10:33:34 6 totally consummate with our view that we want the case tried
10:33:37 7 quickly and efficiently.

10:33:39 8 The chip supplier option is obviously one that we
10:33:43 9 endorsed, and we suggested it to you and it's been suggested in
10:33:47 10 the status reports from us as well. We think from a legal and
10:33:51 11 a procedural and practical standpoint, it is the best way to
10:33:55 12 go. There is a problem incident in it, though, that hasn't
10:33:59 13 been raised with the Court that I think needs to be raised
10:34:03 14 right now in order to put all the issues out on the table.

10:34:07 15 Putting to the side the second issue, which is delay,
10:34:10 16 there will be delay -- I think a substantial amount of delay --
10:34:15 17 from the parties who are similarly situated to CSR, Broadcom
10:34:19 18 and others, who have not been in this case. There have been
10:34:23 19 Broadcom products, by the way, that have been accused since
10:34:27 20 2009. And unlike CSR, those chip makers have not attempted to
10:34:33 21 intervene. Their particular customers have not impleaded
10:34:36 22 them. And so I can think one can assume that they will resist
10:34:42 23 any effort to be drawn into this controversy now.

10:34:45 24 So there will be some Rule 12 practice and other
10:34:48 25 things that will of necessity cause delay in addition to those

10:34:53 1 things that Mr. Goodpastor himself has acknowledged and that
10:34:55 2 you're gathering from some of the discussions you're hearing
10:34:59 3 from the customer defendants. But there is this other problem,
10:35:02 4 and this other problem is joinder.

10:35:04 5 And there is a big problem with regard to joinder, in
10:35:07 6 fact. And I've got -- I've cited a case in the joint status
10:35:11 7 report for the 593 case called *Rudd*. And *Rudd* was the case
10:35:18 8 cited by -- in the legislative history from the -- of the
10:35:22 9 America Invents Acts. And *Rudd* states -- is acknowledged to
10:35:27 10 state the majority view of joinder issues. And *Rudd* cites a
10:35:33 11 whole string of cases under Rule 20 that talk about the
10:35:37 12 impropriety of joinder of competing manufacturers when the only
10:35:44 13 common issue is the allegation that both of those competing
10:35:48 14 manufacturers have infringed claims of the same patent.

10:35:53 15 I brought a couple of other cases with me today that
10:35:59 16 I thought I'd hand up to Your Honor and, of course, share with
10:36:03 17 opposing counsel. These are cases cited in -- cited in *Rudd*.
10:36:14 18 *Spread Spectrum*, *Androphy*, and *Billups* are the three cases.
10:36:18 19 And I think *Spread Spectrum* says it to me best, anyway, in the
10:36:23 20 *Spread* -- except I can't say the two words without stuttering.

10:36:27 21 In the *Spread Spectrum* case, both Kodak and
10:36:33 22 Heidelberg were alleged to infringe the same patent by the
10:36:37 23 plaintiff. And Heidelberg and Kodak were competitors. The
10:36:45 24 Court considered the motion to sever under Rule 21 based on
10:36:53 25 improper joinder and granted it and stated the following:

10:36:58 1 Although Kodak and Heidelberg have both allegedly
10:37:02 2 infringed the '623 patent, this does not conclusively establish
10:37:06 3 that the actions arise from a common transaction or occurrence,
10:37:09 4 which of course we know is a requirement of Rule 20. In fact,
10:37:12 5 joinder is often improper where two competing businesses have
10:37:16 6 allegedly infringed the same patent by selling different
10:37:20 7 products.

10:37:20 8 In the instant case, the causes of action against
10:37:25 9 Kodak and Heidelberg are arguably related only because they are
10:37:29 10 derived from the '623 patent. The accused infringing software,
10:37:32 11 other evidence, and witnesses are all different and unique to
10:37:35 12 the actions against Kodak and Heidelberg. Because
10:37:38 13 plaintiff's --

10:37:38 14 THE COURT: Tell me where you're going with this.

10:37:41 15 MS. FROST: Your Honor, if you try to bring in or we
10:37:44 16 try to bring in Broadcom or TI or whomever, they will be
10:37:48 17 misjoined in a case with CSR. CSR will move to sever or to
10:37:54 18 have a separate trial and have a CSR-only case. And the law I
10:38:00 19 submit is clear. We don't have to rely on the America Invents
10:38:03 20 Act, although it certainly accords with it. Existing Rule 20
10:38:07 21 law will make a combined case with a CSR, Broadcom, and TI
10:38:13 22 product in the same case improper. And Rule 21 will support a
10:38:20 23 motion for severance and separate trial of those cases.

10:38:24 24 THE COURT: I understand that. When I talk about
10:38:31 25 combining things, believe me, that does not mean we just have

10:38:35 1 to have one trial. But I am more concerned at this point,
10:38:38 2 because I see most of what we discussed several months ago has
10:38:46 3 now become less enticing to everyone. And that if we attempted
10:38:57 4 to have a suppliers-first system, then I have not accomplished
10:39:04 5 anything if we go that way, because I'm going to have a whole
10:39:07 6 series of motions that have been described by not only other
10:39:11 7 defendants but you as intervenor.

10:39:13 8 So it looks like we are -- nobody has offered me a
10:39:16 9 better solution. Where am I wrong? Am I now back to looking
10:39:22 10 at the 593 case and looking at the 593 case alone and worrying
10:39:27 11 about the 771 case another day?

10:39:31 12 One of these days, perhaps over a drink, I would like
10:39:34 13 to hear why Bandspeed chose to file one case in the Eastern
10:39:38 14 District and one case in the Western District. But I don't
10:39:43 15 need to worry about that right now. If they had both been
10:39:46 16 filed here in the first instance, I would be a lot further
10:39:49 17 along with both of these cases than having them split up.

10:39:55 18 But I understand what you're saying about joinder.
10:40:00 19 So if I'm now discussing with you the 593 case alone, how much
10:40:07 20 time do you need to get it to trial? And I'm not going to give
10:40:10 21 you a whole lot, because you both ought to be pretty familiar
10:40:14 22 with it.

10:40:14 23 MS. FROST: Your Honor, from our standpoint whether
10:40:16 24 it's a -- and I'll at my own peril here suggest a second
10:40:24 25 alternative. If it's not the 593 case, I think another case

10:40:28 1 that could proceed with equal dispatch and achieve an awful lot
10:40:32 2 is a CSR only case going first. So that case could actually go
10:40:34 3 to trial first. That case would be your chip supplier
10:40:37 4 solution.

10:40:39 5 The other parties could do whatever they're talking
10:40:41 6 about that has all this delay in discovery built into it over
10:40:45 7 here in a second case that would involve other chip suppliers.
10:40:49 8 But the CSR-only case would in fact resolve I would say
10:40:53 9 80 percent of the dispute that's in this courtroom right now
10:40:58 10 currently.

10:40:58 11 It doesn't matter, by the way, and I'm sure the Court
10:41:01 12 is well aware, the CSR declaratory judgment action covers all
10:41:05 13 CSR products regardless of whether they have been accused,
10:41:11 14 regardless of whether the customers who use them are in the
10:41:13 15 courtroom or not. It covers the waterfront. So it's a very
10:41:17 16 big dispute resolution device that the Court could use
10:41:21 17 separately. Use it as the bellwether, if you will, for the
10:41:23 18 rest of these cases and go ahead and go to trial. And I think
10:41:26 19 we could get to trial in that case or in the 593 case, either
10:41:30 20 one, in Q1 of 2013, maybe Q2.

10:41:36 21 THE COURT: I was thinking earlier than that. What
10:41:38 22 do you need to do to get that case ready to go to trial?

10:41:41 23 MS. FROST: We need regular discovery, Your Honor.

10:41:44 24 THE COURT: Well, how long do you need? I don't want
10:41:46 25 to hear generalities.

10:41:48 1 MS. FROST: Well --
10:41:48 2 THE COURT: I think we can get it to trial in a year.
10:41:51 3 MS. FROST: And that's pretty much --
10:41:52 4 THE COURT: Or less. Next fall would be what I would
10:41:54 5 have in mind. And I think you can get all the discovery done
10:41:58 6 in that period of time. Mr. Goodpastor?

10:42:04 7 MR. GOODPASTOR: Your Honor, we did submit a
10:42:05 8 scheduling order with the 593 case with the current parties
10:42:10 9 only. And, basically, it took our scheduling order that we had
10:42:13 10 proposed last time we were here for that portion and just moved
10:42:16 11 it back a couple of months. And we ended up hitting the
10:42:19 12 holiday, so it actually moves it to the first quarter of 2013.

10:42:23 13 A couple of points, though, with the joinder issue, I
10:42:26 14 think if you decide ultimately you need to have separate trials
10:42:31 15 with separate IC makers, you can do that. But the discovery is
10:42:34 16 going to be the same.

10:42:39 17 And so --

10:42:41 18 THE COURT: That's the other thing to discuss, and
10:42:45 19 you raise it appropriately. But go ahead.

10:42:45 20 MR. GOODPASTOR: And so we're not sure that really
10:42:47 21 creates a problem that would prevent you from going ahead
10:42:51 22 according to your original plan.

10:42:53 23 And I'm not sure if the recent revision to the
10:42:58 24 Patent Act will have any effect on that at all given the nature
10:43:01 25 of the way those defendants or third parties would be brought

10:43:04 1 in.

10:43:05 2 So we still think, you know, we're ready to go
10:43:08 3 forward. We have a proposed schedule for a 593 case alone, if
10:43:11 4 that's the course you want to take. But we also think that you
10:43:14 5 can proceed down your original course as well.

10:43:17 6 In both cases, though, we're going to have to add new
10:43:20 7 products and in both cases we're going to have the same issues
10:43:23 8 about needing discovery to assert claims against CSR as well as
10:43:27 9 do infringement contentions against CSR. So we're going to
10:43:32 10 encounter those problems and those discovery issues whether you
10:43:35 11 go forward with the 593 case alone or you go forward with your
10:43:39 12 original plan. And I want to make the Court aware of that.

10:43:43 13 But given that additional discovery needed in the 593
10:43:47 14 case alone and where we are today, we've submitted this new
10:43:50 15 proposed order. And I think it's essentially in line with what
10:43:54 16 you suggested, but we knocked it to the first quarter of 2013
10:43:58 17 because of some holiday issues surrounding different key dates
10:44:03 18 in the order.

10:44:08 19 THE COURT: Mr. Weaver?

10:44:10 20 MR. WEAVER: Your Honor, I actually think you got it
10:44:13 21 exactly right when you started out this morning. You should --

10:44:18 22 THE COURT: You're the only one.

10:44:19 23 MR. WEAVER: I actually don't think -- I'll use the,
10:44:24 24 I guess it was President Nixon's phrase, the silent majority.
10:44:28 25 I think the vast majority of folks in this room prefer a chip

10:44:33 1 supplier-only trial. Whether as Ms. Frost suggests there would
10:44:38 2 be potentially two, three, or four chip supplier trials, we
10:44:43 3 both know that the chance of all of them going to trial reduces
10:44:49 4 dramatically as you approach the courthouse steps. But that
10:44:53 5 is -- that is an issue for another day.

10:44:55 6 The issue is what is the most efficient way for this
10:45:00 7 Court to conduct this case between now and when it eventually
10:45:05 8 goes to trial. And I submit that the chip supplier-only option
10:45:08 9 is the most efficient way to do it.

10:45:10 10 The difference in timing I find a little bit
10:45:14 11 curious. What I heard Ms. Frost say was that we do either a
10:45:20 12 first quarter or second quarter of 2013 trial. That's what
10:45:23 13 Mr. Goodpastor just said. And the proposal by the chip
10:45:26 14 supplier-only model has us doing it in the summer of 2013.
10:45:31 15 Those sound like a difference without a distinction. We'd be
10:45:35 16 on the same approximate schedule, discovery would go hand in
10:45:39 17 hand in both cases for all chip suppliers, and it would be the
10:45:44 18 most efficient way to dispatch this case.

10:45:46 19 I submit you've got it right as you've currently got
10:45:50 20 it contemplated.

10:45:53 21 THE COURT: Ms. Frost?

10:45:55 22 MS. FROST: I do have a couple of comments. I do
10:46:00 23 think that CSR-only case will go much faster than a combined
10:46:07 24 chip supplier case, even if there are separate trials at the
10:46:10 25 end, principally because they are going -- there is going to be

10:46:14 1 a very significant amount of delay in bringing in the
10:46:19 2 additional suppliers.

10:46:20 3 There are going to be multiple -- it will be on an
10:46:23 4 indemnity basis. It's going to be contract -- on a contract
10:46:27 5 basis. Each of these different defendants will have to bring
10:46:30 6 in a supplier based on a particular contract claim that it may
10:46:35 7 have based on an indemnity agreement under myriad laws of
10:46:40 8 myriad countries probably that will get before you. Those
10:46:44 9 defendants who have not -- those suppliers who have not stepped
10:46:47 10 up to the plate yet -- and it's been a long time -- won't be
10:46:51 11 here voluntarily. You will have a very arduous motion practice
10:46:57 12 before you.

10:46:57 13 Those parties, if they are ultimately held in the
10:47:00 14 case, will want to have another look at the Markman. And I
10:47:06 15 just see this as getting -- it's getting way off the track
10:47:10 16 by --

10:47:11 17 THE COURT: No. Here -- but there are ways to do
10:47:14 18 this. One is to proceed in that fashion and deal with things
10:47:21 19 as they come along. We can proceed in one case with everything
10:47:29 20 parallel with the idea that CSR could very well be tried first
10:47:35 21 and tried alone. I do not need and will not need to engage in
10:47:39 22 any additional claims construction with regard to getting that
10:47:43 23 issue to trial. We and my chambers are capable of keeping
10:47:48 24 track of these things.

10:47:49 25 The most important thing about putting these cases in

10:47:55 1 some way together is to get all of the discovery in a position
10:47:59 2 where it can be used in any case, whenever it's tried, and we
10:48:02 3 don't have complaints that somebody didn't get the opportunity
10:48:05 4 to engage in that discovery. That's why we're having this
10:48:09 5 conference, is because I can think of a million ways to handle
10:48:14 6 this case.

10:48:14 7 And so, you know, we've had a lot roadblocks thrown
10:48:19 8 up here today. But hearing from you, I can figure out ways to
10:48:23 9 resolve these things. I can handle a motions practice very
10:48:30 10 easily. There's nothing in the rules that compels me to deal
10:48:33 11 with a certain motion before I deal with another motion. I can
10:48:36 12 see what the motions are and I may very well hold some
10:48:39 13 motions. Just because somebody jumps in and wants to file a
10:48:47 14 motion for severance or separate trials doesn't mean I have to
10:48:50 15 rule on it right of way.

10:48:52 16 Just because somebody jumps in and wants to do
10:48:55 17 additional claims construction, then I can deal with that as we
10:48:58 18 come along. And if I need to schedule another claims
10:49:01 19 construction along the way at the same time, you're getting the
10:49:04 20 discovery you need and we're working toward getting one case to
10:49:07 21 trial, and if we can combine other cases with that, fine.

10:49:10 22 I don't find this that hard. I find that you have a
10:49:13 23 lot harder job than I do, and that you need to spend a whole
10:49:18 24 lot of time and it's hard with a group this large working out
10:49:21 25 these little nuances. But there's not going to be a perfect

10:49:26 1 solution to this. This is going to be a difficult case for me,
10:49:29 2 and it's going to be a difficult case for you. And that's just
10:49:33 3 the world we live in.

10:49:35 4 And what I want to do is get it moved along in a way
10:49:38 5 that gets it to trial. I'm a lot more concerned about getting
10:49:43 6 it to trial. I think many of you have heard this speech
10:49:46 7 before, but we spend as much time trying to out-plead one
10:49:51 8 another as we do trying a case -- in most cases, more. This
10:49:57 9 case, if we tried it altogether, if I combined the two cases
10:50:02 10 and schedule one trial, we do it all at one time. It's still
10:50:06 11 going to take less time than all of the time y'all are going to
10:50:10 12 spend filing motions, many of which I can just tell you,
10:50:13 13 because I've been down the road before, are not going to be
10:50:16 14 well-taken. But everybody is going to be proud of them, and
10:50:19 15 their clients are going to be happy with them and we're going
10:50:22 16 to go that way.

10:50:23 17 So, on the one hand, I'm very moved toward getting
10:50:27 18 this case moved -- moving as a combined thing because that gets
10:50:31 19 discovery going. And it gets discovery in a way that it can be
10:50:36 20 used in every case no matter how much we divide it up later.

10:50:42 21 MS. FROST: I think -- may I respond to one part of
10:50:44 22 that, Your Honor? I think the discovery that's unique to CSR,
10:50:48 23 obviously, Bandspeed's already -- as I understand it, Bandspeed
10:50:53 24 has already done its document production under the Eastern
10:50:57 25 District rules. So it's got it all locked and loaded over

10:50:59 1 there.

10:50:59 2 The CSR discovery will actually be only unique to CSR
10:51:03 3 and its customer defendants. It won't be usable by, and I
10:51:07 4 submit shouldn't be really accessible to, the Broadcoms and the
10:51:12 5 others because, I mean, obviously this is source code, this is,
10:51:16 6 you know, very confidential information and proprietary
10:51:19 7 information and very aggressive competitors.

10:51:22 8 THE COURT: I don't -- that's really easy to do.

10:51:24 9 MS. FROST: Right. But it's out of sync in the
10:51:27 10 schedule.

10:51:28 11 THE COURT: Yeah. Because it got out of sync when I
10:51:31 12 got a second case.

10:51:32 13 MS. FROST: I understand.

10:51:33 14 THE COURT: Like I said this is just hard. It's not
10:51:35 15 going to go on a perfect way. The way to handle this
10:51:39 16 information that's proprietary is not rely on a protective
10:51:45 17 order that we provide in our local rules as a default
10:51:48 18 protective order. Sit down and work out protective orders on
10:51:52 19 various classes of documents.

10:51:54 20 MS. FROST: Right. Which we'll do.

10:51:55 21 THE COURT: And that can be done. What it may mean
10:52:00 22 is that y'all have to recognize that this is going to be the
10:52:06 23 squeaky wheel that's going to need your grease for a year and a
10:52:11 24 half as opposed to all other case that you have. Maybe I can
10:52:15 25 help you with your billable hours for 2012, too.

10:52:18 1 MS. FROST: Well, my biggest concern, Your Honor, is
10:52:20 2 this, is that we're going to get the CSR -- we're ready to go.
10:52:22 3 You know, we're ready to go get our case set for trial, and we
10:52:25 4 think we can do it in 12 months. We'll do our discovery with
10:52:28 5 Bandspeed who has got a head start on us because they've
10:52:31 6 already done a lot in the Eastern district. But we'll get our
10:52:35 7 discovery done, and then there will be this -- there will be
10:52:40 8 this disconnect, there will be all of this activity on the
10:52:42 9 other side of the case where we're stymied because we can't go
10:52:45 10 forward with things because that -- this group is now --

10:52:50 11 THE COURT: No.

10:52:52 12 MS. FROST: -- stuck.

10:52:52 13 THE COURT: I can get you to trial. I can give you a
10:52:55 14 separate trial. That is not a problem with me. I've said
10:53:00 15 earlier I think the CSR case can go to trial next winter.

10:53:04 16 MS. FROST: Okay.

10:53:05 17 THE COURT: I don't think we have to wait for the
10:53:06 18 first quarter of 2013. But we might.

10:53:14 19 But here is the deal: Just because if I were to say
10:53:23 20 I'm going to do a supplier option first and you raise the
10:53:30 21 question of whether there would be misjoinder doesn't mean that
10:53:34 22 I can't solve the joinder problems later --

10:53:36 23 MS. FROST: Absolutely.

10:53:38 24 THE COURT: -- and still get you to trial.

10:53:39 25 MS. FROST: Absolutely.

10:53:41 1 THE COURT: I see no reason why we can't get all of
10:53:43 2 the parties in here and worry about what we're going to do with
10:53:47 3 them later. I just want everybody that's going to get sued
10:53:50 4 under these patents and that has a stake in these patents in
10:53:54 5 front of me so I can deal with it instead of leaving anything
10:53:58 6 else handing -- hanging out there.

10:54:00 7 I can tell you and I'll tell the plaintiffs that at
10:54:04 8 some point you're going to have run your string on new products
10:54:11 9 you want to bring and I'm not going to care very much about if
10:54:14 10 you got objections about it later. At some point you have to
10:54:17 11 say, If we win, we're going to get enough money off of these
10:54:20 12 products. And that's just the way it's going to be because
10:54:23 13 that's the way it is.

10:54:25 14 Now, you know, I'm not hearing a whole lot here that
10:54:28 15 makes me think that you-all are capable of sitting down and
10:54:34 16 working out an order on this. I've got -- I mean, a schedule
10:54:38 17 on this. I've got some proposals from the plaintiffs that I
10:54:42 18 can -- I can start with on this. But it continues to sound to
10:54:48 19 me like that probably what I need to do is render an order that
10:54:56 20 allows discovery to go forward. It's not the way I like to do
10:55:00 21 it, but I'm not a one-size-fits-all guy. And even though this
10:55:05 22 will be a little bit different than the way I usually handle
10:55:10 23 patent cases, this is a little bit different than the usual
10:55:12 24 patent cases that I get.

10:55:14 25 So if I need to carve out and do another Markman

10:55:21 1 after we get everybody in here, I will do that related to those
10:55:25 2 things and if I need to work out a separate track.

10:55:28 3 But I don't -- the biggest thing I want to avoid in
10:55:32 4 this case, if I can possibly avoid it, is two separate sets of
10:55:38 5 discovery being done, because that is really, really
10:55:43 6 ineffective for you and a nightmare for me. I want everything
10:55:49 7 that is discovered regarding these patents to be capable of
10:55:54 8 being used in every case that we may end up trying on it.

10:55:57 9 You know, it's not that hard. You know, we get all
10:56:01 10 of the discovery done, you either get it settled or we go to
10:56:05 11 trial. If we need to have several trials, we have several
10:56:08 12 trials. You know, I could be trying you guys three times or I
10:56:12 13 could try three felony cases. You know, a trial is a trial as
10:56:16 14 far as I'm concerned.

10:56:18 15 You came armed with something, Ms. Frost.

10:56:20 16 MS. FROST: I did. A CSR-only proposal so the Court
10:56:25 17 can see what we had in mind. And it's not -- in terms of
10:56:27 18 timing, we've got Q1 of 2013, so it's not different terribly
10:56:33 19 from Bandspeed. But it is a little different and just involves
10:56:35 20 our case. And on discovery, obviously, you know, what CSR has
10:56:40 21 will be useful for it and for its customers. I think it's the
10:56:46 22 Bandspeed discovery that will be the most applicable across the
10:56:51 23 spectrum of products and parties.

10:57:51 24 THE COURT: Well, we are at a situation where no
10:58:14 25 matter what I do, we're going to have at least some differing

10:58:20 1 tracks, because I have got to deal with a track -- track that
10:58:28 2 allows the plaintiff to assert additional infringing products
10:58:39 3 and the defendants an opportunity to determine whether they
10:58:42 4 want to implead other chip suppliers. Because that is the only
10:58:50 5 way to -- that I see to get to a point where we have everybody
10:58:59 6 in this case that needs to get in this case or that anybody
10:59:02 7 wants to get in this case.

10:59:04 8 There is no reason why that can't be occurring while
10:59:11 9 we are proceeding ahead toward a Bandspeed CSR trial. We are
10:59:22 10 just going to have to combine everything and have it moving in
10:59:26 11 some parallel nature, which appears to me that I just need to
10:59:45 12 sit down and come up with an order and just tell you-all what
10:59:50 13 it is and you have to live with it.

10:59:54 14 I will tell you, Mr. Goodpastor, Mr. Sauer, just at a
11:00:02 15 quick glance, I don't see a whole lot wrong with Ms. Frost's
11:00:10 16 proposal in getting CSR to trial. I can always change my mind
11:00:23 17 about trying it first later as we proceed, but we need to
11:00:28 18 proceed in this case.

11:00:40 19 For instance, you-all could easily agree on the
11:00:47 20 protective order and serve initial disclosures. I think
11:00:58 21 amended pleadings would pretty much take care of itself
11:01:04 22 because, if I'm going to allow you to amend for the lawsuit as
11:01:11 23 a whole, then other parties get to amend their responses or
11:01:18 24 whatever they have without leave.

11:01:33 25 So let me hear from anybody else that wants to talk

11:01:36 1 about this. There is not a consensus conclusion to this.

11:01:43 2 That's why I get paid the little bucks. I will sit down --

11:01:48 3 MR. WEAVER: Your Honor, David Weaver on behalf of

11:01:51 4 RIM. And others can -- can say if they disagree, but

11:01:57 5 Bandspeed's proposal that they submitted to Your Honor for the

11:02:02 6 chip supplier trial, we're fine with the dates that they've

11:02:06 7 proposed in there, at least conceptually, with the exception of

11:02:09 8 the one that I brought to Your Honor's attention, which is the

11:02:12 9 date for us to bring in the chip suppliers from the new

11:02:18 10 products which we said was 30 days rather than 14.

11:02:22 11 THE COURT: Right. Now, which date is that in the

11:02:24 12 order of the schedule that Ms. Frost proposed?

11:02:28 13 MR. WEAVER: So she does not have that date. I guess

11:02:30 14 the closest would be her deadline to amend pleadings. So she's

11:02:40 15 got a date ...

11:02:45 16 THE COURT: Well, that's why I said I'm going to have

11:02:48 17 work out -- neither one of -- none of the three proposals that

11:02:51 18 I have handle everything.

11:03:02 19 Now, let me ask you a question: Under the

11:03:05 20 spreadsheet proposal for a general chip supplier trial, the

11:03:08 21 plaintiff had proposed a week after the scheduling order --

11:03:17 22 now, I want to make sure I understand -- to file their amended

11:03:21 23 complaint. Did you want 30 days after the filing of that

11:03:24 24 amended complaint or 30 days ...

11:03:30 25 MR. WEAVER: After the amended compliant. Yes, Your

11:03:33 1 Honor. That is where we would get the names of the products --
11:03:36 2 the new accused products.

11:03:37 3 THE COURT: The difference is they had presumed they
11:03:40 4 would file leave to amend. I'm not going to deal with leave to
11:03:43 5 amend. I'm going to allow amendments.

11:03:54 6 MR. WEAVER: So it would be 30 days after we got that
11:03:56 7 amended compliant.

11:03:57 8 THE COURT: Well, I can work that into this.

11:04:04 9 Ms. Frost, on your proposal with regard to CSR, what did you
11:04:12 10 anticipate in the way of amended pleadings by February 21st?

11:04:22 11 MS. FROST: I thought if the parties needed to clean
11:04:24 12 anything up in terms of eliminating affirmative defenses or
11:04:28 13 adding them or if Bandspeed had any claims they wanted to ask,
11:04:33 14 for example, we would want to do more discovery on equitable
11:04:37 15 conduct, for instance, to see if that was something we would
11:04:39 16 want to add because of the heightened pleading requirements and
11:04:42 17 the Rule 11 requirements for that.

11:04:44 18 I don't envision this is a product add amendment
11:04:49 19 because, as I mentioned, all CSR products are at issue
11:04:52 20 irrespective of that.

11:04:54 21 THE COURT: No. I understand that. But I'm trying
11:04:56 22 to combine these two things so it works out.

11:04:58 23 MS. FROST: Right. I understand.

11:04:58 24 THE COURT: If the plaintiff were to amend, then we
11:05:04 25 don't solve the whole amendment problem by giving a

11:05:13 1 February 21st deadline to amend because we're still going to be
11:05:18 2 involved in fact discovery until August, which means, if I were
11:05:30 3 to look at this the way you have it, I can assure you I'm still
11:05:33 4 looking potentially at motions for leave to amend later when
11:05:37 5 you finish your discovery.

11:05:40 6 So I don't accomplish a whole lot by giving you a
11:05:44 7 February 21st deadline to cut off amended pleadings. What I do
11:05:51 8 accomplish is giving -- your all discovery completion date is
11:06:00 9 not until November 7th. But what I give you is -- give the
11:06:10 10 plaintiff an opportunity to amend, the defendants an
11:06:15 11 opportunity to implead other parties and to answer the amended
11:06:25 12 pleading, and then I still have another round of amended
11:06:27 13 pleadings somewhere that needs to be worked in.

11:06:30 14 MS. FROST: My proposal, because it's CSR-only,
11:06:35 15 didn't envision any impleader. So it was really just cleaning
11:06:39 16 up amendments more than anything else. I thought we -- some of
11:06:42 17 the stipulated discovery things we talked about in the
11:06:45 18 CSR-Bandspeed camp that I thought we could probably get to. We
11:06:50 19 would get comfortable with what we needed generally by then.
11:06:54 20 But, I mean, obviously, I'm not wedded to that date at all.

11:06:58 21 THE COURT: All right. Anything else from anybody?
11:07:17 22 (No response)

11:07:17 23 THE COURT: All right. Here is what I'm going to
11:07:19 24 do: I'm going to consolidate the two cases, because that will
11:07:35 25 put everything together for purposes of discovery. Then I'm

11:07:44 1 going to render a scheduling order that will look similar but
11:07:50 2 not exactly like any of the proposals that I have. It is far
11:07:58 3 and away not going to be a perfect scheduling order, but it
11:08:05 4 will get this thing moving.

11:08:09 5 It is my intention right now, subject to changing
11:08:15 6 later, to draft that scheduling order in such a manner as it
11:08:27 7 gets us moving most quickly toward trying Bandspeed and CSR.
11:08:35 8 So it will probably be a hybrid type of all claims and
11:08:45 9 supplier-first options, but not perfect.

11:08:54 10 There will be a supplement to that scheduling order
11:08:58 11 filed after I see who else is brought into the case and when
11:09:04 12 they answer and what we may need to do with regard to
11:09:13 13 accommodating those parties on additional claims that need to
11:09:21 14 be construed and things of that nature. So the scheduling
11:09:27 15 order, what you need to understand -- and it will be difficult
11:09:29 16 for you -- will end up with various tentacles going out from it
11:09:36 17 to do certain things.

11:09:37 18 It will undoubtedly involve us having other
11:09:44 19 conferences. A couple of you inquired as to whether you can
11:09:52 20 appear by phone. The reason the answer was no -- and that will
11:09:54 21 probably continue to be -- is you look at the number of people
11:09:57 22 you have in this room. We're likely to have some more. Maybe
11:10:00 23 we'll lose a few if there are additional settlements. But we
11:10:07 24 end up taxing the limited electronic abilities that the
11:10:18 25 Judicial Branch has due to the actions of the Legislative

11:10:23 1 Branch, and so it will just be necessary to probably get you
11:10:28 2 all in here.

11:10:30 3 I will say this, as I have said before: I realize
11:10:35 4 it's hard for a lot of lawyers and your clients to understand
11:10:39 5 this. But when we have a conference, I can get by with one
11:10:46 6 lawyer to a party. If you want to have additional lawyers to a
11:10:50 7 party, that's fine. I'm not excluding that. But when your
11:10:55 8 clients inquire as to why do we have to have two lawyers
11:10:58 9 there? Why can't some of them be on the phone? The reason
11:11:02 10 that I can't have some of them on the phone is because of our
11:11:05 11 capabilities here. So if you want to send four lawyers, you're
11:11:09 12 welcome to. If you only want to send one to the conferences,
11:11:13 13 you can. So take that back to your general counsels and your
11:11:16 14 clients.

11:11:17 15 But it's my intention that, because of the size of
11:11:21 16 this case, we're going to have all of our conferences done like
11:11:27 17 we did today, because if I allow one of you the opportunity to
11:11:31 18 appear by phone, I have to allow all of you the opportunity to
11:11:35 19 appear by phone. And that's what I can't get to with the size
11:11:39 20 like this.

11:11:39 21 I'm sure that all of you have law firm capabilities
11:11:47 22 that are better than what we have here. Someday you will start
11:11:51 23 having these hearings in somebody's office, and then everybody
11:11:55 24 can appear by phone. But we can't do it here.

11:11:58 25 So is there anything that anyone wants to say while

11:12:00 1 I've got you all here together? If not, I will get out an
11:12:07 2 order. Some will like it, some will not, or perhaps all of you
11:12:11 3 will not. But it will at least get us moving, and it will
11:12:14 4 consolidate the cases and it will set an overall scheduling
11:12:18 5 order and it will incorporate, at least in this first instance,
11:12:22 6 the idea that Bandspeed and CSR will go to trial first at this
11:12:27 7 point.

11:12:27 8 So that's where we're headed. Everybody be safe over
11:12:34 9 the holidays. It was good seeing you here today, and we'll
11:12:38 10 move forward. So at this time, the Court's in recess.

11:12:42 11 (End of transcript)

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1 **UNITED STATES DISTRICT COURT)**

2 **WESTERN DISTRICT OF TEXAS)**

3 I, Arlinda Rodriguez, Official Court Reporter, United
4 States District Court, Western District of Texas, do certify
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7 I certify that the transcript fees and format comply with
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10 WITNESS MY OFFICIAL HAND this the 14th day of
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